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No. 07-

IN THE

Supreme Court of the United States

BICO STUPAKOFF AND RUSSELL JAMES,
Petitioners,

v.

OTTO (GMBH & CO KG), OTTO DOOSAN LTD., AND OTTO SUMISHO INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

JONATHAN W. YOUNG *
W. ALLEN WOOLLEY
CHRISTINE E. SKOCZYLAS
WILDMAN, HARROLD,
ALLEN & DIXON, LLP
225 West Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an order approving a bankruptcy plan release and injunction, procured through constitutionally insufficient notice, may nonetheless become enforceable against parties who have not moved to enforce their rights within the "reasonable time" contemplated by Federal Rule of Civil Procedure 60(b).

PARTIES TO THE PROCEEDINGS

Petitioners are Bico Stupakoff and Russell James. Respondents are Otto (GmbH & Co KG), Otto Doosan Ltd., and Otto Sumisho Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Bico Stupakoff and Russell James respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was entered on March 13, 2008 and is unpublished but electronically reported at 2008 WL 687230. It is reproduced at App. A. The opinion of the United States District Court for the Southern District of New York is unpublished but

electronically reported at 2007 WL 656902. It is reproduced at App. B. The opinion of the United States Bankruptcy Court for the Southern District of New York is reported at 354 B.R. 51 and is reproduced at App. C. A related opinion of the Bankruptcy Court concerning the same Chapter 11 reorganization plan is unpublished but electronically available at 2006 WL 2577825. It is reproduced at App. D.

JURISDICTION

The court of appeals issued its opinion on March 13, 2008. Petitioners did not seek a rehearing. The jurisdiction of this Court is invoked under 12 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 60 provides, in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether herertofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the

> judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based had been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.[1]

The pertinent provisions of Section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), Section 1144 of the Bankruptcy Code, 11 U.S.C. § 1144, and Federal Rules of Bankruptcy Procedure 7001 and 9024 are reproduced at App. E.

STATEMENT OF THE CASE

In a decision that diverges sharply from the established law in at least seven of the federal circuits, the court of appeals in this case affirmed the decisions below based upon the conclusion that a bankruptcy court has discretion under Rule 60(b) of the Federal Rules of Civil Procedure to deny relief to a creditor

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[1] The Petitioners are citing to the version of Federal Rule of Civil Procedure 60(b) that was in effect at the time of the underlying bankruptcy court decision. The language of Rule 60 was amended, effective December 1, 2007, "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." *See* FED. R. CIV. P. 60, Advisory Committee Notes, 2007 Amendments. These changes "are intended to be stylistic only." *Id.* The final sentence of the prior Rule 60(b), which was not included in the foregoing quotation, has also been deleted as "unnecessary." *Id.* "Relief continues to be available only as provided in the Civil Rules or by independent action." *Id.*

who does not seek relief from an allegedly void plan of reorganization within what the bankruptcy court believes to be a "reasonable time." *See* FED. R. CIV. P. 60(b). Petitioners are now foreclosed from challenging the enforceability of a broad release and injunction purporting to extinguish their claims against the Respondents, notwithstanding the Petitioners' contention that they did not receive constitutionally required notice. As a result, they will be unable to pursue their claims against Respondents unless this Court grants review.

The court of appeals's ruling presents a critically important question about the enforceability of an order obtained without the level of notice required by the Due Process Clause: Can an otherwise unenforceable order become enforceable against parties whose rights the order purports to extinguish because those parties did not affirmatively move to enforce their rights within the "reasonable time" contemplated by Federal Rule of Civil Procedure 60(b)? The court of appeals's ruling on this issue—and the minority position it represents—has broad consequences, particularly in the context of the growing number of Chapter 11 "mega cases," where (as in this case) plans of reorganization can impact the rights of hundreds or even thousands of creditors. This Court's review is critical to clarify the consequences of inadequate notice and to resolve the current conflict within the federal circuits on this issue.

Background

Petitioners are top-tier fashion photographers in the business of taking and licensing photographs for commercial use, including retail catalogues and websites. Petitioners granted Spiegel, Inc., a domestic

apparel retailer, a limited license for the use of certain of Petitioners' electronic images in its domestic retail catalogs and website. Petitioners continue to own the sole and exclusive copyrights in the photographs. The license did not permit Spiegel to transmit the photographs for use by any other entities.

Respondents are international apparel and merchandise retailers. Petitioners contend that, notwithstanding the limited nature of the license, Spiegel provided Petitioners' images to Respondents, who had neither a valid license nor permission to use the images. Respondents proceeded to use the photographic images in their own retail catalogs and websites in violation of Petitioners' copyrights. Because the scope and nature of the use of photographs dictates the prices users of the photographs must pay, Spiegel obtained its license for the use of Petitioners' photographs in its domestic catalog and website sales at a fraction of the cost of a license for the use of the same photographs in both domestic and international catalogs and websites. [JA208.][2]

On January 30, 2004, another photographer who had also supplied images to Spiegel, Peter Rosenbaum Photography Corporation ("Rosenbaum"), filed a lawsuit in the United States District Court for the Northern District of Illinois against Respondents (the "Illinois Litigation"), seeking to recover damages for similar copyright violations in connection with Respondents' unauthorized use of Rosenbaum's photographic images. In early November 2005, Rosenbaum sought leave from the court in the Illinois Litigation

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[2] All citations in the form "[JAxxx.]" refer to record evidence included in the Joint Appendix that was before the Second Circuit.

to amend its complaint. [Pet. App. 15a.] The proposed amendment requested certification of the Illinois Litigation as a class action on behalf of other photographers, models, photo shoot producers, photo shoot clothes stylists, and photo shoot hair and make-up artists. [JA206-7.] According to Rosenbaum's allegations, Respondents had collectively used well over a thousand photographs in which Rosenbaum and other photographers exclusively owned copyrights. [JA208-209.]

Spiegel and a number of its direct and indirect subsidiaries (collectively, the "Debtors") had previously obtained an order in the Debtors' Chapter 11 cases purporting to bar claims against Respondents related to Spiegel. In March 2005, more than a year after Rosenbaum filed the Illinois Litigation, the United States Bankruptcy Court for the Southern District of New York entered an order approving the Spiegel debtors' disclosure statement and setting a hearing on the confirmation of the Debtors' Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code ("Plan"). [Pet. App. 14a.] The Plan includes sweeping a Release and Injunction, which purports to release and enjoin not only claims against the Debtors, but also all claims against Respondents, who were non-debtors, that relate to Spiegel or its affiliated co-Debtors. [Pet. App. 14a-15a.] The bankruptcy court approved this Release and Injunction in order to facilitate agreements that provided for Respondents to pay over $260 million to the debtors' estates. [Appellees' Br. 1.]

Neither Respondents nor Spiegel provided Petitioners with actual notice that they were requesting that the bankruptcy court enter a Release and Injunction

purporting to extinguish Petitioners' claims against Respondents.[3] The Bankruptcy Court confirmed the Plan on May 25, 2005, and the Plan, including the Release and Injunction, went into effect on June 21, 2005. [Pet. App. 15a.]

On November 15, 2005, shortly after Rosenbaum filed its motion to amend the Illinois Litigation, Respondent Otto (GmbH & Co KG) filed a notice of injunction in the Illinois Litigation, which asserted that the claims pled in the Illinois Litigation were barred by the Release and Injunction contained in the confirmed Plan. [Pet. App. 15a.] Although the Plan went into effect on June 21, 2005, this was the first time that the Release and Injunction had been brought to the attention of the court in the Illinois Litigation. [Pet. App. 16a.]

On November 29, 2005, the court in the Illinois Litigation denied Rosenbaum leave to amend its complaint and stayed the action until the Bankruptcy Court could rule on the enforceability and applicability of the Plan's Release and Injunction. At the hearing, the Illinois Court warned that "to actually proceed before getting permission from the Bankruptcy Court to proceed could be a . . . serious violation" of the Release and Injunction and instructed Rosenbaum to "proceed rather cautiously." *Peter Rosenbaum Photography Corp. v. Otto Doosan Mail Order, Ltd.*, No. 04 C 767 (N.D. Ill.), Hr'g Tr., Nov. 29, 2005, 7-8.

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[3] Spiegel did provide publication notice of the hearing on confirmation of the Plan containing the Release and Injunction. The Petitioners have contended in the proceedings below that, as known creditors, they were entitled to actual notice, and publication notice was insufficient for this purpose.

On April 10, 2006, Rosenbaum filed a Motion To Temporarily Lift the Stay of Proceedings for the Limited Purpose of Filing a Second Amended Class Action Complaint. On April 13, 2006, the court in the Illinois Litigation denied the motion and again directed Rosenbaum to seek relief in the Bankruptcy Court as to the enforceability and applicability of the Release and Injunction. On May 4, 2006, Rosenbaum filed a motion in the Bankruptcy Court for the Southern District of New York seeking (i) a declaration that the claims in the Illinois Litigation were not barred by the Release and Injunction; and (ii) authorization to proceed against Respondents. [JA179-80.] The Petitioners are not currently parties to the Illinois Litigation, but wish to join this litigation as parties plaintiff in the event it is determined that the Release and Injunction does not bar such action.

Proceedings Below

Based on the Illinois court's comments, Petitioners believed it would be inadvisable to initiate litigation against the Respondents without first obtaining a ruling regarding the enforceability of the Release and Injunction. Accordingly, Petitioners filed an adversary proceeding in the Bankruptcy Court on June 21, 2006 requesting a declaration that the Release and Injunction were unenforceable against them due to the lack of constitutionally adequate notice. [JA545-55.] Petitioners asserted that both Spiegel and Respondents: (i) were aware that liability had been asserted in the Illinois litigation with respect to unauthorized use of copyrighted photographs; (ii) knew or should have known that Spiegel had only a limited license for use of Petitioners' photographs; and (iii) therefore knew or should have known that the Release and Injunction in the proposed Plan granted

relief for their benefit against Petitioners. [JA549-50.] Notwithstanding their alleged actual knowledge, Respondents failed to provide Petitioners with actual notice of the proposed extinguishment of their claims prior to the confirmation of the Plan, in contravention of Petitioners' due process rights. [JA550.]

On October 5, 2006, Respondents moved to dismiss Petitioners' adversary complaint, arguing (among other things) that the complaint was subject to the time limitations of Federal Rule of Civil Procedure 60(b) and that the complaint should be dismissed pursuant to Rule 12(b)(6) because it failed to state a claim that Petitioners were known creditors entitled to actual notice. [JA742-81.]

The bankruptcy court issued an order dismissing Petitioners' adversary complaint on November 1, 2006. The order cited two independent grounds for dismissal. First, the bankruptcy court held that Petitioners had failed to state a claim that Petitioners were known creditors entitled to actual notice. [Pet. App. 22a-23a.] Second, the bankruptcy court concluded that the adversary proceeding was untimely. [Pet. App. 24a.] Although Petitioners brought their adversary proceeding as a separate declaratory judgment action pursuant to 28 U.S.C. § 2201, the bankruptcy court determined that the adversary proceeding was essentially "a collateral attack on the Plan and Confirmation Order that were approved by this Court over a year ago" and was therefore governed by Rule 60(b) of the Federal Rules of Civil Procedure. [Pet. App. 24a.] The Bankruptcy Court then found that Petitioners "have not brought their request before this Court in a reasonable time," as Rule 60(b) requires. [Pet. App. 24a.]

Petitioners appealed the bankruptcy court's order dismissing the adversary proceeding to the United States District Court for the Southern District of New York.[4] The district court affirmed based solely on the bankruptcy court's first ground for dismissal, that Petitioners had not adequately pled that they were known creditors entitled to actual notice.[5] [Pet. App.

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[4] Petitioners' appeal to the district court also addressed two other bankruptcy court rulings, neither of which is pertinent to the review requested here. First, Petitioners appealed the bankruptcy court's denial of their motion to modify the Plan for the limited purpose of allowing Petitioners to intervene in the Illinois litigation in order to preserve their rights while the adversary proceeding was resolved. Petitioners brought this motion under Rule 60(b), assuming without conceding the applicability of the Release and Injunction. The bankruptcy court denied the motion because it determined that Petitioners failed to bring it within a reasonable time. [Pet. App. 24a.] The district court and the Second Circuit Court of Appeals affirmed. [Pet. App. 3a-4a, 9a-10a.] Petitioners contend that the denial of this relief equitably tolls any statutes of limitation that may be applicable to their claims against the Respondents. Second, Petitioners appealed the bankruptcy court's order denying Rosenbaum's motion, which contained findings and defined terms broad enough to extinguish the Petitioners' claims against the Respondents. The Petitioners argued that it was error for the bankruptcy court to extinguish their claims in the context of deciding Rosenbaum's motion, especially in light of the fact that the Petitioners had not yet received a hearing on their constitutional claims. The district court held that this appeal was moot, given the affirmance of the bankruptcy court's dismissal of Petitioners' claims under Rule 12(b)(6). [Pet. App. 9a.] The court of appeals affirmed. [Pet. App. 5a.]

[5] The district court stated in a footnote that it was not necessary to review the Bankruptcy Court's holding that Petitioners declaratory judgment action was barred by Rule 60(b). [Pet. App. 9a-10a.] The court proceeded to note in dicta that it had no doubt that, even if the Bankruptcy Court had not dismissed pursuant to Rule 12(b)(6) and 60, it would have declined to

8a-9a.] Petitioners appealed the district court's decision to the United States Court of Appeals for the Second Circuit.

The court of appeals issued its ruling on March 13, 2008. That ruling affirmed the decisions of the bankruptcy court and district court solely on the basis that the request for declaratory judgment was *untimely*. [Pet. App. 3a-4a.] The court of appeals's ruling did not address or affirm any part of the district court's ruling, nor did it even mention the lower courts' finding that Petitioners' complaint failed to state a claim. Instead, the court of appeals simply held that the bankruptcy court was well within its discretion to apply the "reasonable time" limitation of Rule 60(b) to Petitioners' adversary proceeding and dismiss it as untimely:

> The Bankruptcy Court's decision to dismiss Appellants' request as untimely because it was "[e]ssentially ... a collateral attack on [the] Plan" and Appellants are "precluded from seeking to modify the Confirmation Order and Plan ... under Rule 60(b) ... [because Appellants] have not brought their request ... in a reasonable time" is well within its discretion ...

[Pet. App. 4a.]

It is this specific ruling by the court of appeals that Petitioners ask the Court to review. Petitioners contend that the court of appeals departed from fundamental principles of due process in endorsing the minority position that an action seeking relief from a

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exercise its discretion to review the claims under the Declaratory Judgment Act because of Petitioners' delay in asserting their rights. [Pet. App. 10a.]

void judgment must be brought in a reasonable time.[6] Under the rationale of the court of appeals, orders and judgments procured through constitutionally insufficient notice may nevertheless become presumptively enforceable, based upon the passage of time, and the competing equities urged by the parties. Petitioners submit that the fundamental Constitutional guarantee of Due Process of Law cannot be subject to such discretionary enforcement.

REASONS FOR GRANTING THE PETITION

The court of appeals's ruling presents a fundamental and critically important question about the consequences of failing to provide the minimum notice required under *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950): Can an otherwise unenforceable order become enforceable against parties whose rights the order purports to extinguish because those parties did not affirmatively move to enforce their rights within the "reasonable time" contemplated by Federal Rule of Civil Procedure 60(b)? Consistent with precedent in a minority of the circuits, the court of appeals held in this case that the bankruptcy court was "well within its discretion" to dismiss as untimely Petitioners' claims that the Release and Injunction is unenforceable because Peti-

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[6] As a result of this ruling and the lower courts' rulings in this case, Petitioners will be foreclosed from pursuing their copyright claims against Respondents if this Court does not grant review. Because the bankruptcy court concluded, as a matter of law, that the Petitioners were unknown creditors who received sufficient notice by publication, Petitioners have effectively been precluded from further challenging the enforceability of the Release and Injunction—whether in the Illinois litigation or another forum.

tioners did not seek relief for seven months after Respondents filed their notice of injunction.

The court of appeals's ruling abandons completely the well-established principle that a judgment or order that is void *ab initio* due to lack of constitutionally required notice is a nullity that can *never* be enforced against a party who did not receive notice. Under this principle, a void judgment "cannot acquire validity" because of laches on the part of the affected party. *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 (2d ed. 1995). But this is exactly the consequence of the court of appeals's ruling here. By holding that the reasonable time limitation applies to voidness challenges—whether brought as Rule 60(b) motions or separate declaratory judgment actions—the court has precluded *any* voidness challenge beyond a reasonable time, effectively reviving the Release and Injunction and making it enforceable.

The majority of circuits continue to adhere to the contrary principle that a void judgment cannot be revived, holding unequivocally that the "reasonable time" requirement of Rule 60(b) does *not* limit the time in which affected parties can challenge the enforceability of allegedly void judgments and orders. However, the Second, Sixth, and Eighth Circuits have held that voidness challenges *are* subject to reasonable time restrictions, and the First Circuit appears recently to have joined this position. This Court should grant certiorari in order to address a clear and acknowledged division among the circuits and to insure uniformity on this important question.

This is not just a theoretical issue. The court of appeals's position has important real-world consequences, particularly in the context of the growing

number of Chapter 11 "mega cases" (such as the Spiegel bankruptcy here) in which the issue is likely to arise more and more frequently. From the perspective of creditors who did not receive notice of a judgment or order impacting their rights, the court of appeals's ruling effectively imposes a duty of diligence to go back to the bankruptcy court and seek to revoke or vacate the void order. Parties who wait for someone to attempt to enforce the void order against them, or who simply pursue their rights purportedly discharged by the void order in another forum, may find—in just a few months—that they have lost the ability to claim the order is unenforceable against them.

For debtors and others with an interest in the finality of bankruptcy court orders, the court of appeals's ruling significantly reduces the long-term threat of non-noticed creditors coming back to attack the complex settlements that are often the centerpiece of successful reorganizations in mega cases. But at the same time, the rationale of this ruling drastically reduces the impetus for debtors to ensure that they diligently ascertain the identities of creditors and get notice right the first time. Thus, the court of appeals's ruling creates a safety net that tilts the balance carefully struck in *Mullane* and its progeny—away from considerations of due process, and toward considerations of finality. Although finality is important, it cannot be at the expense of baseline due process requirements.

I. THE COURT OF APPEALS'S RULING IS CONTRARY TO WELL-ESTABLISHED PRINCIPLES OF DUE PROCESS.

As an initial matter, the court of appeals's decision warrants this Court's review because this case pre-

sents a fundamental *due process* issue. Almost six decades ago, this Court held in *Mullane* that due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In order to satisfy this bedrock constitutional requirement, the notice given prior to the adjudication of property rights must be "reasonably calculated under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. As the *Mullane* Court explained, the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.*

Applying the standard announced in *Mullane*, this Court has held that creditors have a constitutional right to adequate notice and the opportunity to be heard in a meaningful way in the course of bankruptcy proceedings. *See, e.g., City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953). Bankruptcy orders entered in contravention of a party's due process rights are void and unenforceable against the party who did not receive due process.[7] *See id.* at 296-97 (reversing an injunction against the enforcement of liens where creditor was

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[7] In the context of large plans of reorganization, the appropriate remedy for due process violations affecting creditors whose claims are small in the context of the plan as a whole will often be to hold that the claims of the improperly notified creditors are not discharged or subject to the plan, rather than revoking or vacating the plan as a whole. *See In re Westway Ford, Inc.*, 170 B.R. 101, 103 (Bankr. S.D. Tex. 1994).

not given adequate notice of the claim bar date and was therefore not barred from asserting claim following bankruptcy reorganization plan); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) (discharge of a claim without reasonable notice violates due process and renders the claim non-dischargeable; claim cannot be bound to the plan of reorganization).

Following *Mullane* and *City of New York* to their logical conclusion, circuit courts have widely adopted the principle that judgments and orders that are void *ab initio* due to lack of constitutionally required notice are a nullity and cannot be revived through the passage of time. *See, e.g., United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000) ("[N]o passage of time can transmute a nullity into a binding judgment."); *Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc. (In re Center Wholesale, Inc.)*, 759 F.2d 1440, 1448 (9th Cir. 1985) ("[V]oid judgment cannot acquire validity because of laches on the part of the judgment debtor.") (citing 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 n.9 (10th Cir. 1979) ("[I]f judgment is void, it is a nullity from the outset."); *see also Page v. Schweiker*, 786 F.2d 150, 154 (3d Cir. 1986) ("A void judgment remains void until such time as jurisdiction is finally determined to exist."). A litigant's delay in challenging the validity of a final judgment is irrelevant; the only question for the court to consider is whether the judgment is void. *See Robinson Eng'g Co. Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 453-54 (7th Cir. 2000) (noting that a litigant's delay in moving to vacate default judgment was irrelevant and reversing the district court's denial of its Rule 60(b)(4) motion).

On its face, the "reasonable time" limitation applicable to Rule 60(b) appears to conflict with the fundamental principle that a judgment or order obtained in violation of due process can never become enforceable. In response, the majority of courts have adopted three special rules in applying Rule 60(b) to voidness challenges. First, the usual requirement under Rule 60(b) that motions to vacate must be brought "within a reasonable time" does not apply to motions alleging a judgment or order is void on due process grounds. *See, e.g.*, *Carter v. Fenner,* 136 F.3d 1000, 1006 (5th Cir. 1998) (explaining that the "'reasonable time' limit of Rule 60(b) cannot be enforced with regard to this class of motion"); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d at 224 n.9 (noting that Rule 60(b)(4) is not subject to any time limitation); *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962) (permitting garnishee's "tardy attack" on default judgment under Rule 60(b)(4)).

Second, district (and bankruptcy) courts do not have discretion in granting relief from a void judgment or order. *See, e.g.*, *Carter*, 136 F.3d at 1005 ("When, however, the motion is based on a void judgment under rule 60(b)(4), the district court has no discretion, the judgment is either void or it is not.") (citing *Recreational Properties, Inc. v. Southwest Mortgage Service Corp.*, 804 F.2d 313-14 (5th Cir. 1986)); *V.T.A.*, 597 F.2d at 224 n.8 ("[I]f voidness is found, relief is not a discretionary matter; it is mandatory."); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 ("[N]o question of discretion" exists when a Rule 60(b) motion is brought under subsection (b)(4).).

Third, although a motion to vacate a void judgment or order under Rule 60(b) is an *available* remedy, a

Rule 60(b) motion (with its concomitant limitations) is not the *exclusive* avenue for avoiding enforcement of void judgments. For instance, a number of courts have simply declined to preclude creditors who did not receive proper notice from pursuing claims purportedly discharged under a confirmation plan. *See, e.g., Dalton Dev. Project #1 v. Unsecured Creditors Comm. (In re Unioil)*, 948 F.2d 678, (10th Cir. 1991) (overruling bankruptcy court's determination in response to motion by debtors that creditors who did not receive proper notice were barred from pursuing claims); *Crow v. Spring Valley Farms, Inc. (In re Spring Valley Farms, Inc.)*, 68 B.R. 756, (Bankr. N.D. Ala. 1986) (denying summary judgment motion in nuisance and trespass law suit arguing that claims were discharged under confirmation order). Similarly, courts have issued declaratory relief in separate actions (like the adversary proceeding here) that were not brought under Rule 60(b). *See, e.g., Chance Rides, Inc. v. Chance Indus., Inc. (In re Chance Ind., Inc.)*, 367 B.R. 689 (Bankr. D. Kan. 2006) (declaratory judgment action seeking determination that state court personal injury claims were not discharged by void confirmation order); *Geno Enters, Inc. v. Newstar Energy U.S.A., Inc. (In re Newstar Energy of Texas, LLC)*, 280 B.R. 623 (Bankr. W.D. Mich. 2002) (declaratory judgment action seeking determination that notice of plan discharging claims insufficient and authorization to proceed with claims in state court).

The court of appeals's ruling in this case rejects all three of these rules. Under the court of appeals's ruling, Rule 60(b) challenges based on lack of constitutionally required notice are subject to the "reasonable time" limitation. Bankruptcy courts do have discretion in granting relief. And an action seeking to prevent enforcement of an allegedly void order is

subject to Rule 60(b), even if brought as a separate proceeding. [*See* Pet. App. 9a-10a.] The net result is that failure to seek timely relief from the issuing court not only forecloses Rule 60(b) as a remedy but precludes *any* action to prevent enforcement of a void judgment or order, effectively making an otherwise void judgment enforceable.

Thus, the court of appeals's holding is fundamentally at odds with the principle flowing from *Mullane* and *City of New York* and endorsed by the majority of courts, that a judgment or order that is void *ab initio* for failure of due process cannot become valid through laches or the passage of time. Clarifying this fundamental due process issue warrants this Court's review.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT AMONG THE CIRCUITS.

This Court's review is also needed to ensure uniformity because the circuits are sharply divided on the question of whether due process challenges to final orders or judgments are subject to the "reasonable time" limitation.

The court of appeals's application of Rule 60(b)'s "reasonable time" limit to Petitioners' request for relief is consistent with existing Second Circuit precedent. Although the Second Circuit has acknowledged that courts have been "exceedingly lenient in defining the term 'reasonable time' with regard to voidness challenges," it has nonetheless repeatedly made clear that district courts retain discretion to deny requests for relief they determine were not made within a reasonable time. *See Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005) (remark-

ing that an action to declare provision of confirmed plan void *ab initio* was subject to "reasonable time" limitations of Rule 60(b)(4)); *see also Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997); *Cent. Vermont Pub. Serv. Corp. v. Herbert*, 341 F.3d 186 (2d Cir. 2003); *State Street Bank & Trust Co. v. Inersiones Errazuriz Limitada*, 374 F.3d 158 (2d Cir. 2004); *Grace v. Bank Leumi Trust Co. of New York*, 443 F.3d 180, 190 (2d Cir. 2006).[8]

The Sixth and Eighth Circuit have similarly applied a reasonable time limitation to Rule 60(b)(4) voidness challenges. *See Manohar v. Massillon Comty. Hosp.*, 208 F.3d 214, No. 99-3481, 2000 WL 302776, at *1 (6th Cir. March 17, 2000) (upholding denial as untimely of Rule 60(b)(4) motion based on lack of subject matter jurisdiction); *Blachy v. Butcher*, No. 03-2079, 2005 WL 843905, at *5 (6th Cir. Apr. 12, 2005) (upholding denial as untimely of Rule 60(b)(4) motion alleging lack of removal jurisdiction); *Richard v. Allen*, 78 F.3d 585, No. 95-3451, 1996 WL 102419 (6th Cir. Mar. 7, 1996) (holding that the district court did not abuse discretion in denying as untimely Rule 60(b)(4) motion based on voidness); *Baldwin v. Cred. Based Asset Servicing & Securitization*, 516 F.3d 734,

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[8] Prior to this case, the Second Circuit had held that a subsequent request for relief as little as a year after the judgment was untimely where voidness was not raised as an issue in an initial request. *State Street Bank*, 374 F.3d at 179; *see also Beller & Keller*, 120 F.3d at 24 (noting that district court probably should have denied as untimely Rule 60(b)(4) motion where party seeking relief filed previous motion that failed to raise the argument). District courts within the Second Circuit have denied Rule 60(b) voidness challenges as untimely where the non-notified party made no previous request for relief. *See United States v. Guzman*, No. S3 92 CR 550, 2006 WL 2637451, at *2 (S.D.N.Y. Sept. 13, 2006).

737 (8th Cir. 2008) (Rule 60(b)(4) motion based on voidness due to lack of notice must be made within a reasonable time).[9]

On the other hand, the majority of circuit courts continue to maintain the contrary position that a judgment or order entered in the absence of constitutionally required notice is void for any and all purposes and may not be revived by the passage of time. *See, e.g.*, *One Toshiba Color Television*, 213 F.3d at 157 ("[N]o passage of time can render a void judgment valid."); *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir. 1993) ("A void judgment cannot acquire validity because of laches on the part of the debtor."); *Owens-Corning*, 759 F.2d at 1448 (same). Thus, notwithstanding the "reasonable time" limitation of Rule 60(b), at least seven circuits have held that a Rule 60(b)(4) motion to set aside a void judgment may be brought "at any time." *See, e.g.*, *One Toshiba Color*

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[9] In 2003, the First Circuit also appears to have adopted the minority view. *See Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 66 (1st Cir. 2003). In *Farm Credit Bank*, the First Circuit eventually concluded that appellants' request for relief was without merit. 316 F.3d at 68. However, in affirming the district court's rejection of the Rule 60(b)(4) motion as untimely, the court indicated that motions brought under rule indeed have a "temporal requirement." *Id.* at 66-67. Citing *Farm Credit*, recent district court cases within the First Circuit have applied a "reasonable time" requirement to Rule 60(b)(4) motions. *See, e.g., Maldonado v. United States*, CA No. 07-119L, CR No. 97-043L, 2007 WL 1592954, at *3 (D.R.I. May 31, 2007) (concluding, inter alia, that appellant's four-and-a-half year delay in bringing his Rule 60(b)(4) motion was unreasonable); *Metro. Prop. & Cas. Ins. Co. v. Elkin (In re Shkolnikov)*, Civ. Action No. 06-10889-DPW, 2006 WL 3536811, at *5 (D. Mass. Dec. 5, 2006) (explaining that a "reasonable time" limit applies to Rule 60(b)(4) motions and remarking that a twenty-six-month delay "cannot be viewed as reasonable").

Television, 213 F.3d at 157; *Garcia Fin. Group, Inc. v. Virginia Accelerators Corp.*, No. 00-1556, 2001 WL 117497, at *2 (4th Cir. Feb. 12, 2001); *Carter*, 136 F.3d at 1005-6 (5th Cir. 1998); *Robinson Eng'g Co.*, 223 F.3d at 448-49; *Owens-Corning*, 759 F.2d at 1448; *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1130 (11th Cir. 1994); *Austin*, 312 F.2d at 343.

Notwithstanding the opinion of the minority circuits, any reading of Rule 60(b)(4) that affords a court the discretion to reject a challenge to a void judgment is untenable. This view—embraced by the *Spiegel* courts—cannot be squared with the widely recognized principle that the passage of time cannot validate an otherwise void judgment. This Court's review is necessary to resolve the current conflict among the federal circuits and ensure that uniform due process protections remain in force.

III. THE COURT OF APPEALS'S POSITION HAS IMPORTANT CONSEQUENCES FOR BANKRUPTCY CREDITORS.

The revivability of void judgments is not a merely theoretical issue. The court of appeals's holding also has important real-world consequences, particularly in the context of Chapter 11 "mega cases," which are becoming more and more common in the bankruptcy courts and which often impact the rights and property interests of hundreds and even thousands of creditors.

Notice to creditors is a key element of the procedural framework by which property rights can be modified in Chapter 11 proceedings. A minimum of twenty-five days notice to creditors is mandated with respect to the approval of Chapter 11 disclosure state-

ment, or the confirmation of a Chapter 11 plan. *See* FED. R. BANKR. P. 2002(b). And the Bankruptcy Code expressly provides each creditor with the opportunity to "appear and be heard on any issue in a case under this chapter." *See* 11 U.S.C. § 1109(b). Notice thus emerges as a crucial linchpin in the Chapter 11 plan process. Property rights may be radically reshaped or eliminated in the context of a Chapter 11 case, but the affected parties must be given notice of these proposed actions, as well as an opportunity to be heard and to defend their property rights. Where the constitutionally sufficient level of notice has not been provided, it necessarily follows that the Chapter 11 plan cannot and should not be enforceable against the affected creditor. *See Reliable Elec.*, 726 F.2d at 620-23.

For creditors who learn after-the-fact that a bankruptcy court has confirmed a plan of reorganization that purports to impair their rights, the court of appeals's ruling means they must act quickly and diligently to vacate or revoke the plan within a reasonable time or risk having the plan become enforceable against them. Unlike the majority view, the rule announced here would not permit parties who did not receive notice to wait for the debtor to attempt to enforce a void plan against them. *See, e.g.*, *Dalton Dev. Project #1*, 948 F.2d 678; *Crow*, 68 B.R. 756. Nor would it allow affected parties to pursue their underlying claims in a different court with the expectation that they will be able to defend against a summary judgment motion based on the discharge by arguing that they did not receive notice. *See, e.g.*, *Chance*, 367 B.R. 689; *Geno Enters.*, 280 B.R. 623. This is a significant burden on creditors that most of the federal circuits do not impose.

In addition, the court of appeals's holding significantly relaxes the consequences to proponents of a plan of failing to give proper notice. Under the majority view, the degree of notice required is flexible and depends on the circumstances. *Mullane,* 339 U.S. at 314. But if the minimum required notice is not given, the resulting court order can never be enforced. *See One Toshiba Color Television*, 213 F.3d at 157; *Owens-Corning*, 759 F.2d at 1448. The majority rule creates a substantial incentive to identify all ascertainable creditors and ensure that everyone entitled to notice receives proper notice. By authorizing bankruptcy and district courts to cut off attacks on inadequate notice after a "reasonable time"—just seven months in this case—the court of appeals's decision significantly reduces this incentive.

In sum, the court of appeals's ruling tips the balance carefully struck in *Mullane* and its progeny against the interests of creditors, increasing the likelihood that some creditors will lose their rights and property interests without proper notice and a fair opportunity to be heard, as happened to Petitioners here.[10] Although the scale, complexity, time-sensitivity, and importance of finality of reorganization plans in mega cases creates a significant temptation to "cut corners" and relax due process standards, it is critical to resist this temptation. Russell

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[10] The unfairness of the lack of notice in this case is further compounded by the fact that the Release and Injunction purported to extinguish Petitioners' claims against *non-debtors.* As courts have recognized, sweeping releases providing blanket immunity for non-debtors present a heightened potential for abuse and should only be used in rare cases. *See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005).

A. Eisenberg & Frances Gecker, *Due Process and Bankruptcy: A Contradiction In Terms?*, 10 BANKR. DEV. J. 47, 48, 68 (1993). This Court's review is necessary to ensure that an appropriate baseline of due process is maintained even in the face of the growing pressures posed by huge bankruptcy proceedings.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JONATHAN W. YOUNG *
W. ALLEN WOOLLEY
CHRISTINE E. SKOCZYLAS
WILDMAN, HARROLD,
ALLEN & DIXON, LLP
225 West Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

* Counsel of Record

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